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No. 96-1481

In The

Supreme Court of the United States

October Term, 1996

MICHAEL O. LEAVITT, as Governor of the State of Utah, and JAN GRAHAM, as Attorney General of the State of Utah,

Petitioners,

vs.

JANE L, JANE F., and JULIE S., on behalf of themselves and all others similarly situated, et al,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF AMICUS CURIAE OF THE STATES OF NEBRASKA ALABAMA, CALIFORNIA, MISSISSIPPI, SOUTH CAROLINA AND SOUTH DAKOTA IN SUPPORT OF PETITIONERS

DON STENBERG
Attorney General

*L. STEVEN GRASZ
Deputy Attorney General
2115 State Capitol
Lincoln, Nebraska 68509-8920
Tel: (402) 471-2682

**Counsel of Record*

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

WILLIAM H. PRYOR, JR.
Attorney General
State of Alabama
11 South Union Street
Montgomery, AL 36130
(334) 242-7401

DANIEL E. LUNGREN
Attorney General
State of California
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
(916) 445-9555

MIKE MOORE
Attorney General
State of Mississippi
P.O. Box 220
Jackson, MS 39205
(601) 359-3692

CHARLES M. CONDON
Attorney General
State of South Carolina
Rembert C. Dennis Bldg.
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-3970

MARK BARNETT
Attorney General
State of South Dakota
500 East Capitol
Pierre, SD 57501-5070
(605) 773-3215

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INTEREST OF THE *AMICI*

Following this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), more than two-thirds of the States enacted statutes attempting to protect fetal life by restricting the reasons for which abortions may be performed late in pregnancy.[1] Although *Roe* expressly recognized the States' authority to enact such statutes, 410 U.S. at 164-65, the ability of the States to enforce these statutes remains uncertain because the Court has not yet considered their constitutionality in any case. Utah's petition presents this Court with an opportunity to address this issue and to determine whether the States' authority to restrict nontherapeutic, late-term abortions is real or illusory.

To ensure that no elective abortions are performed on viable unborn children, Utah has adopted a "bright-line" rule forbidding nontherapeutic abortions after the twentieth week of gestation, as measured from the date of conception, Utah Code Ann. § 76-7-302(3) (1995), which, as the district court found, *Jane L. v. Bangerter*, 809 F.Supp. 865, 869, 873 (D. Utah 1992), is currently the earliest stage in pregnancy at which viability is possible. The Tenth Circuit Court of Appeals held that Utah may not adopt such a rule because of the possibility – which the record suggests is entirely hypothetical – that a small number of women in Utah may seek nontherapeutic abortions of nonviable fetuses after twenty weeks gestation. *Jane L. v. Bangerter*, 102 F.3d 1112, 1117 (10th Cir. 1996). According to the court of appeals, a restriction on the reasons a

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[1] The statutes are set forth in the Appendix to this Brief.

woman may seek an abortion of a nonviable fetus, even one which takes effect no earlier in pregnancy than the point at which some fetuses may survive, cannot be reconciled with this Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), which forbids the State from imposing an "undue burden" on the performance of a pre-viability abortion. *Jane L. v. Bangerter*, 102 F.3d at 1117.

Amici submit that the Tenth Circuit's judgment is wrong and should be reversed. The adoption of a "bright-line" rule, which forbids nontherapeutic abortions from being performed at the earliest stage of pregnancy at which viability is possible, is the only effective means of making sure that no viable unborn children are aborted for elective reasons. Moreover, restricting nontherapeutic abortions to the first twenty weeks of pregnancy (before viability is currently possible) can in no real sense be regarded as the imposition of an "undue burden" under *Casey*.

To protect fetal life, the States need to know whether they may restrict nontherapeutic, late-term abortions, and whether such restrictions may be implemented by a "bright-line" rule that is both reasonable and consistent with the known facts of fetal survival. "State and federal courts as well as legislatures throughout the Union must have guidance as they seek to address this subject in conformance with the Constitution." *Casey*, 505 U.S. at 845. *Amici* respectfully request this Court to provide that needed guidance by granting Utah's petition for *certiorari*.

SUMMARY OF ARGUMENT

The issue presented by Utah's petition is whether a State, in seeking to vindicate its interest in protecting fetal life, may adopt a "bright-line" rule for determining viability where the rule is reasonable, consistent with contemporary medical knowledge as to when viability is possible, and not unduly burdensome of a woman's right to obtain an abortion.[2] Utah Code Ann. § 76-7-302(3) (1995) forbids nontherapeutic abortions after the twentieth week of gestation, as measured from the date of conception.[3]

The Tenth Circuit Court of Appeals held that § 76-7-302(3) is unconstitutional under this Court's decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992),

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[2] In addition to Utah, four other States have adopted "bright-line" rules forbidding nontherapeutic abortions: Massachusetts (during or after the 24th week of gestation); Nevada (after the 24th week); North Carolina (after the 20th week); and Pennsylvania (during or after the 24th week). Two other States have established presumptions of viability at particular stages of gestation: Missouri (requiring fetal viability testing at 20 weeks' gestation); Oklahoma (creating a rebuttable presumption of viability after the 24th week of gestation). The statutes are set forth in the Appendix.

[3] "The duration of pregnancy can be measured from the last menstrual period (LMP) or from conception. Calculation of conception age begins 2 weeks later than LMP." *Jane L. v. Bangerter*, 809 F.Supp.at 869. Utah calculates gestational age "measured from the date of conception. . . . " Utah Code Ann. § 76-7-302(3). Thus, under the statute, "[t]he statutory cutoff for non-therapeutic abortions is *after* 20 weeks, which is 21 weeks from the date of conception or 23 weeks LMP." 809 F.Supp. at 869 (emphasis in original).

because both its purpose and effect was to place a substantial obstacle in the path of a woman seeking an abortion of a *pre*-viable, *post*-20 week unborn child. *Jane L. v. Bangerter*, 102 F.3d at 1116-18. Without disputing the district court's finding that at twenty-one weeks' gestation (measured from the date of conception), *some* fetuses *are* viable, 809 F.Supp. at 869, 873, the court of appeals held that § 76-7-302(3) is invalid because it prevents the abortion of *other* fetuses who are *not* viable at that stage of pregnancy. 102 F.3d at 1116-18. Relying principally on this Court's decisions in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), and *Colautti v. Franklin*, 439 U.S. 379 (1979), the court of appeals concluded that "viability is a matter to be determined by an attending physician, and that until viability is actually present the State may not prevent a woman from choosing to abort." 102 F.3d at 1118.

Amici submit that the court of appeals has misread this Court's precedents. Although there is language in both *Danforth* and *Colautti* indicating that the determination of viability must be left to the judgment of the attending physician, neither case concerned a statute, like Utah's, that created a "bright-line" rule for determining viability. Moreover, given the difficulty in accurately assessing the exact stage of pregnancy at which a particular fetus becomes viable, the use of a "bright-line" rule is clearly reasonable. "Nothing in *Roe*, or any of its progeny, holds that a State may not effectuate its compelling interest in the potential life of a viable fetus by seeking to ensure that no viable fetus is mistakenly aborted because of the inherent lack of precision in estimates of gestational age." *Webster v. Reproductive Health Services*, 492

U.S. 490, 544 (1989) (Blackmun, J., concurring in part and dissenting in part).

The Tenth Circuit's conclusion that § 76-7-302(3) imposes an "undue burden" upon a woman seeking an abortion of a nonviable fetus in violation of *Casey* does not withstand scrutiny. First, as the district court found, 809 F.Supp. at 869-70, no woman in Utah has ever sought a nontherapeutic abortion of a nonviable fetus after the twentieth week of gestation, and no physician licensed to practice medicine in Utah has ever performed or has ever sought to perform a post-20 week abortion for reasons not allowed by § 76-7-302(3).[4] A statute that restricts conduct no one seeks to engage in cannot be regarded as imposing an "undue burden," even in a theoretical manner. Second, even assuming that a few women would seek to abort their nonviable fetuses after the twentieth week of gestation for nontherapeutic reasons, limiting such abortions to the first twenty weeks of pregnancy can in no practical sense be regarded as the imposition of an "undue burden." Finally, even if the State may not adopt a "bright-line" rule for viability, the Court should grant Utah's petition because, in mute defiance of this Court's remand order, *see Leavitt v. Jane L.*, 116 S.Ct. 2068 (1996), the court of appeals refused to decide whether § 76-7-302(3) has any constitutional *post*-viability applications as required by the express provisions of the Utah severability statute. *See* Utah Code Ann. § 76-7-317.

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[4] For the reasons set forth in Utah's petition, the Tenth Circuit's attempt to question this finding, 102 F.3d at 1117-18, is based on a misreading of the record.

ARGUMENT

THE COURT SHOULD REVIEW THE TENTH CIRCUIT'S JUDGMENT BECAUSE THE COURT OF APPEALS ERRED IN HOLDING THAT A STATE MAY NOT ADOPT A "BRIGHT-LINE" RULE FOR DETERMINING VIABILITY WHERE THE RULE IN QUESTION IS REASONABLE AND CONSISTENT WITH THE KNOWN FACTS OF FETAL VIABILITY, AND DOES NOT UNDULY BURDEN A WOMAN'S RIGHT TO OBTAIN AN ABORTION BEFORE VIABILITY.

In *Roe v. Wade*, 410 U.S. 113 (1973), this Court held that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* at 164-65. The Court reaffirmed this holding in *Planned Parenthood v. Casey*, 505 U.S. at 879. The Court confirmed "the State's power to restrict abortions after fetal viability if the law contains exceptions for pregnancies which endanger the woman's life or health." *Id.* at 846.

The Utah statute struck down by the Tenth Circuit allows late-term abortions to be performed if the physician determines that the abortion is necessary "to save the . . . woman's life," "to prevent grave damage to [her] medical health," or "to prevent the birth of a child that would be born with grave defects." Utah Code Ann. § 76-7-302(3) (1995) (incorporating by reference Utah Code Ann. § 76-7-302(2)(a), -(d), and -(e)). The statute authorizes abortions to be performed in those "rare circumstances in which the pregnancy is itself a danger to [the woman's] own life or health," *Casey*, 505 U.S. at 851,

and thus satisfies the language of *Roe*, reaffirmed in *Casey*, that the law contain "exceptions for pregnancies which endanger the woman's life or health." *Casey*, 505 U.S. at 846. Although "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nonthereapeutic abortions," 505 U.S. at 860, viability may occur as early as the twenty-third week of pregnancy. *Id.* The district court found, and the court of appeals did not dispute, that "[s]urvival as early as 21 weeks gestational age (23 weeks LMP) is possible," 809 F.Supp. at 869, which is the "statutory cutoff for non-therapeutic abortions" under the Utah statute. *Id.*

The Tenth Circuit, however, held that Utah could not adopt a "bright-line" rule for determining viability, even one which is reasonable and consistent with contemporary medical knowledge of when viability is possible, "because by mandating a definition of viability that may not be correct in a given case, it impacts the choice of a woman whose fetus remains nonviable after twenty weeks from conception." *Jane L. v. Bangerter*, 102 F.3d at 1115. The court of appeals failed to explain how a woman who may be considering an elective abortion is burdened by having to act on her decision during the first twenty weeks of her pregnancy.

In support of its holding, the court of appeals relied on this Court's decisions in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), and *Colautti v. Franklin*, 439 U.S. 379 (1979). *Jane L. v. Bangerter*, 102 F.3d at 1115. In *Danforth*, the Court upheld Missouri's definition of viability, over the plaintiffs' argument that the definition conflicted with *Roe* because it did not "contain any reference to a

gestational time period." *Danforth*, 428 U.S. at 63. In response, the Court stated:

> [I]t is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician.

Id. at 64. The Court thus rejected the contention that "a specified number of weeks in pregnancy must be fixed by statute as the point of viability." *Id.* at 65.

In *Colautti*, the Court struck down as unconstitutionally vague a viability-determination requirement in Pennsylvania law. 439 U.S. at 390-97. Prior to discussing that requirement, the Court reviewed its earlier decisions in *Roe, Doe v. Bolton*, 410 U.S. 179 (1973), and *Danforth*. Summarizing its holdings in these three cases, the Court stated:

> [T]his Court has stressed viability, has declared its determination to be a matter for medical judgment, and has recognized that differing legal consequences ensue upon the near and far sides of that point in the human gestation period. We reaffirm these principles. Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support. Because this point may differ with each pregnancy, neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment

> of viability – be it weeks of gestation or fetal weight or any other single factor – as the determinant of when the State has a compelling interest in the life or health of the fetus. Viability is the critical point. And we have recognized no attempt to stretch the point of viabilty one way or the other.

Id. at 388-89.

Significantly, neither *Danforth* nor *Colautti* involved a legislative attempt to define viability in terms of gestational age alone. Unlike the narrow *holding* in *Danforth*, that the States *need not* incorporate a "gestational time period" into the definition of viability, the broad statements in both *Danforth* and *Colautti* that the States *may not* select a single factor as the determinant of when viability occurs are nonbinding *dicta*.[5]

Moreover, both opinions were replete with record references attesting to the difficulty of determining viability in a particular case. *See Danforth*, 428 U.S. at 64 n.3,

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[5] It is worth noting that, in *Danforth*, the Court cited with approval a three-judge district court decision striking down a Minnesota statute which provided that a fetus "shall be considered potentially 'viable' " during the second half of its gestation period. 428 U.S. at 65 & n.5 (*citing Hodgson v. Anderson*, 378 F.Supp. 1008, 1016 (D. Minn. 1974), *dismissed for want of jurisdiction sub nom. Spannaus v. Hodgson*, 420 U.S. 903 (1975), *aff'd sub nom. Hodgson v. Lawson*, 542 F.2d 1350 (8th Cir. 1976)). The three-judge court struck down the statute because the defendants in that case had presented no evidence of fetal viability at twenty weeks. 378 F.Supp. at 1016. This case is different because it is undisputed that some fetuses may be viable at twenty-one weeks gestation (twenty-three weeks LMP).

65 n.4; *Coluatti*, 439 U.S. at 395-96 & nn.14, 15. That difficulty strongly suggests the need for adoption of a "bright-line" rule, so long as the rule is reasonable, *i.e.*, that the rule does not establish a line that restricts abortions before viability is possible, and is one which is consistent with the known facts of fetal survival. Less than five years after *Colautti* was decided, at least one Justice expressed concern, albeit in a different context, that "[t]he State may no longer rely on a 'bright line' that separates permissible from impermissible regulation." *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 455 (1983) (O'Connor, J., dissenting).

The need to provide the States with more flexibility in promoting their interest in fetal life was finally recognized in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), where the Court upheld Missouri's requirement of fetal viability testing at twenty weeks gestation, as measured from the first day of the woman's last menstrual period. Contrary to the Tenth Circuit's peculiar reading, the Court in *Webster* did *not* "reiterate its holdings in *Danforth* and *Colautti* that the determination of viability is a matter for the judgment of the attending physician, and that therefore the legislature could not give one element, such as gestational age, dispositive weight." 102 F.3d at 1115. Rather, a majority of the Court upheld the viability testing requirement (which established a rebuttable presumption of viability at twenty weeks gestational age), and a plurality of the Court voted to sustain the testing requirement notwithstanding its view that the requirement was incompatible with *Danforth, Colautti* and *Roe*. *Webster*, 492 U.S. at 513-20.

Justice O'Connor did not join that portion of the plurality opinion in *Webster* upholding Missouri's fetal viability testing requirement. In explaining why she did not believe that it was necessary to reconsider *Roe* in order to sustain the testing requirement, Justice O'Connor noted that "[n]o decision of this Court has held that the State may not directly promote its interest in potential life when viability is possible." *Webster*, 492 U.S. at 528 (O'Connor, J., concurring in part and concurring in the judgment). Commenting on the Court's decision in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), which involved a challenge to a Pennsylvania statute requiring a second physician to be present during an abortion performed "when viability is possible," *Thornburgh*, 476 U.S. at 769-770, Justice O'Connor stated:

> The *Thornburgh* majority struck down the Pennsylvania statute merely because the statute had no exception for emergency situations and not because it found a constitutional difference between the State's promotion of its interest in potential life when viability is possible and when viability is certain. [*Thornburgh*], 476 U.S. at 770-771. . . . [T]here is no hint in the opinion of the *Thornburgh* Court that the State's interest in potential life differs depending on whether it seeks to further that interest postviability or when viability is possible. Thus, all nine Members of the *Thornburgh* Court appear to have agreed that it is not constitutionally impermissible for the State to enact regulations designed to protect the State's interest in potential life when viability is possible.

Webster, 492 U.S. at 528 (O'Connor, J., concurring in part and concurring in the judgment). Justice Blackmun, who would have struck down the testing requirement on other grounds, acknowledged that the State has the right "to ensure that no viable fetus is mistakenly aborted because of the inherent lack of precision in estimates of gestational age." 492 U.S. at 544 (Blackmun, J., concurring in part and dissenting in part).[6] That is precisely what Utah has done in enacting § 76-7-302(3).

The need for States to be able to rely upon a "bright-line" rule for determining viability is evident from an examination of this Court's opinion in *Colautti*, 439 U.S. 379 (1979). Referring to the "uncertainty of the viability determination itself," *id.* at 395, the Court noted,

> . . . a physician determines whether or not a fetus is viable after considering a number of variables: the gestational age of the fetus, derived from the reported menstrual history of the woman; fetal weight, based on an inexact estimate of the size and condition of the uterus; the woman's general health and nutrition; the quality of the available medical facilities; and other factors. Because of the number and the imprecision of these variables, the probability of any particular fetus' obtaining meaningful life

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[6] The district court in *Webster* found that "the medical evidence is uncontradicted that a 20-week fetus is *not* viable," and that "23 1/2 to 24 weeks gestation is the earliest point in pregnancy where a reasonable possibility of viability exists." 662 F.Supp. 407, 420 (W.D. Mo. 1987) (emphasis in original). The district court also found that there may be up to a four-week error in estimating gestational age, *id.* at 421, which, as the Court said, "supports testing at 20 weeks." 492 U.S. at 516.

> outside the womb can be determined only with difficulty. Moreover, . . . even if agreement may be reached on the probability of survival, different physicians equate viability with different probabilities of survival, and some physicians refuse to equate viability with any numeral probability at all. In the face of these uncertainties, it is not unlikely that experts will disagree over whether a particular fetus in the second trimester has advanced to the stage of viability.

Id. at 395-96.

Colautti is an eloquent statement of why adoption of a "bright-line" rule for determining viability is necessary to safeguard the State's interest in protecting fetal life. The only way to ensure that *no* viable unborn children are aborted for nontherapeutic reasons is to forbid elective abortions at the earliest stage of pregnancy at which viability is possible. Otherwise, it is inevitable that some viable unborn children will be aborted because of an erroneous determination that they were not viable. While the imposition of a "bright-line" rule might have the effect of preventing a very limited number of women from obtaining an abortion of a nonviable fetus after the twentieth week of pregnancy for nontherapeutic reasons (although this record does not support that hypothesis), that cannot in any meaningful sense be regarded as creating an "undue burden" upon the woman's right to an elective abortion when she has had twenty weeks to decide whether to have an abortion. As this Court observed in *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990), in upholding Missouri's "clear and convincing" standard of proof to govern proceedings to withdraw life-sustaining medical treatment from an

incompetent patient, "the Constitution does not require general rules to work faultlessly; no general rule can." *Cruzan*, 497 U.S. at 284.

Amici submit that there is no conflict between the adoption of a "bright-line" rule for determining viability and this Court's opinion in *Casey*. Although the Court in *Casey* stated that "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions," and that "the attainment of viability may continue to serve as the critical fact," 505 U.S. at 860, the Court also noted that viability may occur as early as 23 to 24 weeks' gestation (measured from the first day of the woman's last menstrual period), *id.*, which is the equivalent of the period Utah has selected for its rule.

In enacting § 76-7-302(3), Utah has not sought to deprive women of "all choice in the matter," *Casey*, 505 U.S. at 850, or to "prohibit any woman from making the ultimate decision to terminate her pregnancy before viability," *id.* at 879. A woman may have an abortion for any reason – therapeutic or elective – before viability is possible. But after viability is possible, she may have one for therapeutic reasons only. There is, as the Court observed in *Casey*, 505 U.S. at 870, "an element of fairness" in this: "In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child." *Id.*

Even assuming, however, that the States may not adopt a "bright-line" rule for determining viability, this Court should grant Utah's petition for *certiorari* because

the Tenth Circuit, once again disregarding the severability langauge in § 76-7-317, refused to consider whether § 76-7-302(3) has any constitutional applications, even after viability. In remanding this case to the court of appeals, this Court ordered the Tenth Circuit to consider the constitutionality of § 76-7-302(3) apart from the constitutionality of § 76-7-302(2), which had been struck down by the district court on the authority of *Casey*. *See Jane L. v. Bangerter*, 809 F.Supp. at 870-71. The court of appeals held that § 76-7-302(2) is unconstitutional because it restricts the reasons for which *pre*-viability abortions may be performed, but the court did not rule on the constitutionality of § 76-7-302(2), insofar as it applies to *post*-viability abortions. 102 F.3d at 1118 n.7. That was error.

Section 76-7-317 mandates severance of unconstitutional *applications*, as well as unconstitutional *language*. By ignoring the statutory mandate of § 76-7-317, and not giving effect to the constitutional applications of § 76-7-302(3), the court of appeals has engaged in "blatant federal-court nullification of state law." *Leavitt v. Jane L.*, 116 S.Ct. at 2072. This Court has repeatedly held that " 'a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it.' " *Dalton v. Little Rock Family Planning Services*, 116 S.Ct. 1063, 1064 (1996) *(quoting Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985)). *See also Ada v. Guam Society of Obstetricians & Gynecologists*, 113 S.Ct. 633 (1992) (Scalia, J., dissenting from denial of *certiorari*) (a federal court should sever unconstitutional language or enjoin only the unconstitutional applications). The court of appeals, in mute defiance of this Court's remand order,

has once again overstepped its judicial function by ignoring Utah's severability statute and not giving effect to the constitutional applications of the law. Entirely apart from the merits presented by Utah's petition, that warrants Supreme Court review.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request this Honorable Court to grant the petition for certiorari.

Respectfully submitted,

DON STENBERG
Attorney General

L. STEVEN GRASZ
Deputy Attorney General
2115 State Capitol
Lincoln, Nebraska 68509-8920
Tel: (402) 471-2682

APPENDIX

State Statutes Restricting Late-Term Abortions[1]

Ariz. Rev. Stat § 36-2301.01(A) (West 1993)

Ark. Code Ann. § 20-16-705(a) (Michie 1991)

Conn. Gen. Stat. Ann. § 19a-602(b) (West 1996 Supp.)

Fla. Stat. Ann. § 390.001(2) (West 1993)

Ga. Code Ann. § 16-12-141(c) (1996)

Idaho Code § 18-608(3) (1987) (life only)

720 Ill. Comp. Stat. Ann. 510/5 (West 1993)

Ind. Stat. Ann. § 16-34-2-1(3) (Michie 1993) (allows post-viability abortions only when necessary to prevent "a substantial permanent impairment of the life or physical health of the pregnant woman")

Iowa Code Ann. § 707.7 (West 1993)

Kan. Stat. Ann. § 65-6703 (1996 Supp.) (allows post-viability abortions only to save the life of the pregnant woman or to prevent the birth a child with severe fetal anomaly)

Ky. Rev. Stat. Ann. § 311.780 (Michie 1995)

La. Rev. Stat. Ann. § 40.1299.35.4(A) (West 1992)

Me. Rev. Stat. tit. 22, § 1598(4) (West 1992 & 1996 Supp.)

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[1] Except as otherwise noted, the statutes set forth in this Appendix allow post-viability (or third trimester) abortions only to preserve the life or health of the pregnant woman.

Md. Code Ann., Health-Gen. II, § 20-209(b)(2)(i) (1996)

Mass. Gen. Laws Ann. ch. 112, § 12M (West 1996) (allows abortion during or after the twenty-fourth week of pregnancy when necessary "to save the life of the mother or if a continuation of her pregnancy will impose on her a substantial risk of grave impairment of her physical or mental health")[2]

Minn. Stat. Ann. § 145.412, subd. 3 (West 1989)

Mo. Ann. Stat. § 188.030(1) (West 1996)[3]

Mont. Code Ann. § 50-20-109(1)(c) (1995)

Neb. Rev. Stat. § 28-329 (1995)

Nev. Rev. Stat. § 442.250(1)(c) (Michie 1996) (allows abortion after the twenty-fourth week of gestation if necessary "to preserve the life or health of the pregnant woman")[4]

N.C. Gen. Stat. § 14-45.1(b) (1993) (allows abortion after the twentieth week of pregnancy if there is a "substantial risk that continuance of the pregnancy would

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[2] The Massachusetts statute does not state how the length of pregnancy is to be determined.

[3] Missouri requires fetal viability testing at twenty weeks gestation, as measured from the first day of the woman's last menstrual period. *See* Mo. Ann. Stat. §§ 188.015(4), 188.029 (West 1996).

[4] A reporting statute, Nev. Rev. Stat. Ann. § 442.260(2)(j), indicates that gestational age is to be measured from the first day of the woman's last menstrual period.

threaten the life or gravely impair the health of the woman")[5]

N.D. Cen. Code § 14-02.1-04(3) (1991) (allows post-viability abortions only if necessary "to preserve the life of the woman" or if "continuation of [the] pregnancy will impose on her a substantial risk of grave impairment of her physical or mental health")

Ohio Rev. Code Ann. § 2919.17 (Anderson 1996) (allows post-viability abortions to prevent the death of the pregnant woman or where there is "serious risk of substantial and irremediable impairment of a major bodily function")

Okla. Stat. Ann. tit. 63, § 1-732 (West 1997)[6]

18 Pa. Cons. Stat. Ann. §§ 3211(a), 3211(b) (West 1996 Supp.) (allows abortion during or after the twenty-fourth week of pregnancy if necessary "to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman")[7]

R.I. Gen. Laws § 11-23-5 (1994) (life only)

S.C. Code Ann. § 44-41-20(c) (Law. Co-op. 1985)

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[5] The North Carolina statute does not indicate how the length of pregnancy is to be measured.

[6] The Oklahoma statute includes a rebuttable presumption of viability after the twenty-fourth week of gestation, as measured from the first day of the woman's last menstrual period.

[7] The Pennsylvania statute measures gestational age from the first day of the woman's last menstrual period. See 18 Pa. Cons. Stat. Ann. § 3203 (West 1996 Supp.).

S.D. Codified Laws § 34-23A-5 (Michie 1994)

Tenn. Code Ann. § 39-15-201(c)(3) (1991)

Tex. Rev. Civ. Stat. Ann. art. 4495b, § 4.011 (West 1997 Supp.) (allows post-viability abortions to prevent the death of the pregnant woman or substantial risk of severe impairment to her physical or mental health)

Utah Code Ann. § 76-7-302(3) (1995) (allows abortion after the twentieth week of gestation, as measured from the date of conception, to save the life of the pregnant woman, to prevent grave damage to her medical health, or to prevent the birth of a child with grave defects)

Va. Code §§ 18.2-71, 18.2-74(b) (West 1996) (allows post-viability abortions only if "continuation of the pregnancy is likely to result in the death of the woman or substantially and irremediably impair [her] mental or physical health")

Wash. Rev. Code Ann. §§ 9.02.110, 9.02.120 (West 1997 Supp.)

Wis. Stat. Ann. § 940.15 (1996)

Wyo. Stat. § 35-6-102 (Michie 1994) (allows post-viability abortions where there is an "imminent peril that substantially endangers [the] life or health" of the pregnant woman)